2004

State of Utah v. Franklin Eric Halls : Brief of Appellee

Utah Court of Appeals

J. Frederic Voros, Jr.; Assitant Attorney General; Mark L. Shurtleff; Utah Attorney General; Happy J. Morgan; Deputy San Juan County District Attorney; Counsel for Appellee.
Andrew Fitzgerald; Attorney for Appellant.

Case No. 20040939-CA

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

FRANKLIN ERIC HALLS,
Defendant/Appellant.

Appeal from jury convictions for possession of a controlled substance, a second degree felony, unlawful possession of imitation controlled substance, a class A misdemeanor, and possession of paraphernalia, a class B misdemeanor, in the Seventh Judicial District Court of Utah, San Juan County, the Honorable Lyle R. Anderson presiding.

Brief of Appellee

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Counsel for Appellant

Oral Argument Requested

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UTAH COURT OF APPEALS

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from convictions for one count of possession of a controlled substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) & (c) (West 2004); one count of unlawful possession of imitation controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37b-4 (West 2004); and one count of possession of paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (West 2004).

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did instructing the jury that "the State must eliminate all reasonable doubt" violate defendant's due process rights?

"Whether [a jury] instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's ruling." *State v. Archuleta*, 850 P.2d 1232, 1244 (Utah 1993) (footnote omitted).

2. By stipulating that he had a prior conviction for drug possession, did defendant invite any error by the court in relying upon that judgment?

This Court will not review "an error committed at trial when [the appellant] led the trial court into committing the error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 58-37-8(2)(a)(i) & (c) (West 2004). Prohibited acts—Penalties

> (2) Prohibited acts B—Penalties:
>
> (a) It is unlawful:
>
> (i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter; . . .
>
> (c) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

STATEMENT OF THE CASE

On 7 September 2004, defendant was charged by amended information with one count of possession of a controlled substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West 2004);[1] one count of unlawful possession of imitation

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[1]Pursuant to Utah Code Ann. § 58-37-8(2)(c) (West 2004), defendant's prior conviction for possession enhanced the current charge from a third degree felony to a second degree felony.

controlled substance, a class A misdemeanor, in violation of Utah Code Ann. § 58-37b-4 (West 2004); and one count of possession of paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (West 2004). R.26-27.

After a one-day trial, the jury found defendant guilty as charged. R.123. Defendant was sentenced to the statutory terms. R.125-26. He timely appealed. R.130.

STATEMENT OF THE FACTS[2]

On the afternoon of 1 March 2004, Jeff Abrams gave his co-worker, defendant, a ride home from work. R.141:61, 122. When they were about "150 yards" from defendant's parents' house, defendant saw Officer Eberling of the Monticello City Police Department and Agent Clark, defendant's parole officer, waiting for him. R.141:122. Defendant became concerned. R141:135. Defendant's "heart was beating fast." *Id.* Jeff "caught a glimpse of [defendant] bending over," and it appeared to him that defendant was "shoving some stuff under . . . the chair." R.141:62.

When Jeff stopped the truck in front of the house, defendant asked Jeff to leave. *Id.* This was unusual because Jeff would "usually go in and say 'hello' to [defendant's] mother and . . . father." *Id.* Jeff was "wondering what was going on," so that when he got home he "checked under the passenger's seat." *Id.* He found a black box containing a set of scales and some baggies. R.141:63, 109. Jeff was "so mad" that defendant would hide "paraphernalia" in his truck that he "went straight to the police station." *Id.* When he arrived

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[2]Except as otherwise noted, this brief recited the facts in the light most favorable to the jury's verdict. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92.

at the police station, he gave Police Chief Adair the items defendant had hidden under the seat. R.141:63, 109. Jeff also asked Chief Adair to search his truck; Chief Adair did so, but found no other contraband. R.141:63, 110. After leaving the police station, Jeff found a glass pipe under the seat, which he turned over to police. R.141:64, 85.

Meanwhile, Officer Eberling and Agent Clark searched defendant. R.141:79, 99-100. Officer Eberling had come to defendant's house to question him about a hit and run accident. R.141:79. Agent Clark accompanied Officer Eberling because he had been "having some problem[s] with [defendant]," who had been "testing positive for methamphetamine." R.141:100. After searching defendant's bedroom and truck, they took defendant down to the police station to question him regarding the hit-and-run accident and "possibly" to administer a urinalysis test. R.141:79, 100.

As they pulled up to the police station, Chief Adair was across the street with Jeff, searching his truck. R141:79, 124. Officer Eberling and Agent Clark took defendant into the office. R141:79. While they were questioning defendant, Chief Adair knocked on the door and handed Officer Eberling the items that Jeff had found under the seat in his truck. R141:79, 100. Those items included a bag with a white crystal substance, a black box containing a set of scales and a couple of small baggies, and a larger empty bag. R141:80, 100. Chief Adair explained that defendant had hidden these items under the passenger's seat in Jeff's truck. R141:100.

After Chief Adair left, Officer Eberling and Agent Clark questioned defendant about the contraband. R141:81, 101. Defendant first denied that the items belonged to him.

R141:101, 126. Eventually, he admitted that the contraband was his. R141:81-82, 101. Defendant told the officers that the white crystal substance was not methamphetamine, but a cutting agent called "MSM." R141:81, 101. Defendant explained that he was planning on buying an ounce of methamphetamine, which he would mix with the cutting agent in order to produce two ounces. *Id.* Then he could sell one ounce and keep the second ounce for himself. *Id.* Subsequent testing of the white crystal substance confirmed that the white substance was not methamphetamine. R141:86.

Defendant also told the officers that he used the scales to weigh the methamphetamine he sold. R141:102. Defendant admitted that two of the baggies had contained methamphetamine, which he had already used. *Id.* Both the baggies and the set of scales tested positive for methamphetamine. R141:87.

At trial, defendant claimed that he did not attempt to hide anything in Jeff's truck and that the contraband Jeff gave to Chief Adair did not belong to him. R141:122, 131. Although defendant admitted to telling the officers that the contraband belonged to him, he claimed to have done so only in an attempt to get Jeff off the hook. R141:129. Defendant testified that he believed that the police had pulled Jeff over and found the contraband in his truck. R141:127. Because defendant was already in trouble for violating his parole and under investigation for a hit-and-run accident, he decided to take responsibility for the contraband to protect Jeff. R141:127-28.

ARGUMENT

I

INSTRUCTING THE JURY THAT "THE STATE MUST ELIMINATE ALL REASONABLE DOUBT" DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS

Defendant claims that the reasonable doubt instruction given at his trial violates the Due Process Clause of the United States Constitution. *See* Br. Aplt. at 10. That reasonable doubt instruction, in compliance with *State v. Robertson*, 932 P.2d 1219 (Utah 1997), *overruled in relevant part by State v. Reyes*, 2005 UT 33, 116 P.3d 305, informed the jury that "[t]he State must "eliminate all reasonable doubt." R. 113 (addendum A). However, after trial, the Utah Supreme Court "expressly abandon[ed]" the "'obviate all reasonable doubt' element of the *Robertson* test." *State v. Reyes*, 2005 UT 33, ¶ 30, 116 P.3d 305.

Relying on *Reyes*, defendant argues that the reasonable doubt instruction here created a "substantial risk that a juror found [defendant] guilty based on a degree of proof below beyond a reasonable doubt." Br. Aplt. at 13 (citation and internal quotation marks omitted).

A. Defendant's *Reyes* claim is unpreserved and does not arise under "exceptional circumstances."

Defendant's *Reyes* challenge is not properly before this Court. "As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. "Utah courts require specific objections in order to 'bring all claimed errors to the trial court's attention to the give the court an opportunity to correct the errors if appropriate.'" *State v. Hardy*, 2002 UT App 244, ¶ 14, 54 P.3d 645 (quoting *State*

v. Brown, 856 P.2d 358, 361 (Utah App. 1993)). To preserve a claim, a defendant must specify the alleged error so that the trial court can "'assess [the] allegations by isolating relevant facts and considering them in the context of the specific legal doctrine placed at issue.'" *Id. at* ¶ 15 (quoting *Brown*, 856 P.2d at 361). "[T]he preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Holgate*, 2000 UT 74, ¶ 11. The exceptional circumstances exception is "ill-defined and applies primarily to rare procedural anomalies." *State v. Dunn*, 850 P.2d 1201, 1209 n. 3 (Utah 1993).

Defendant concedes that the issue he presses was not preserved by trial counsel. *See* Br. Aplt. at 13. However, he argues that the fact that *Reyes* was not decided until after his trial constitutes an exceptional circumstance excusing his failure to preserve the claim. *See* Br. Aplt. at 13-14. In effect, he argues that he could not object at trial, because the basis for his objection did not yet exist.

This very argument was rejected by the supreme court in *State v. Lopez*, 886 P.2d 1105 (Utah 1994). Lopez was tried for sex crimes against a child. On appeal, he argued that a photo array was impermissibly suggestive under state due process principles announced in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). *Lopez*, 886 P.2d at 1113. At trial, Lopez had not objected on this ground, as *Ramirez* had not yet been decided. *Id.* On appeal, the supreme court had to "determine whether Lopez may now raise that issue on appeal." *Id.* The court held that "Lopez cannot raise the issue of state due process for the first time on

appeal because he has not demonstrated that the 'plain error' or 'exceptional circumstances' exceptions exist." *Id.*

The case at bar is indistinguishable. Nothing prevented defendant from challenging the reasonable doubt instruction even before *Reyes* was decided. In *Reyes* itself, the State argued that the *Robertson* three-part test was unconstitutional, despite the absence of any authority declaring it unconstitutional. Moreover, here, the court of appeals, in an opinion issued before defendant's trial, described the *Robertson* three-part test as "constitutionally flawed" and "not consistent with United States Supreme Court precedent." *See State v. Reyes*, 2004 UT App 8, ¶ 22, 30, 84 P.3d 841. Nothing prevented defendant from preserving his issue by making this argument at trial.

This claim is thus barred.[3]

B. Defendant's *Reyes* challenge fails because the prosecutor did not argue that the State needed to refute only "doubts that are sufficiently defined."

Defendant's claim lacks merit in any event. The due process danger identified in the *Reyes* opinion did not arise here.

The reasonable doubt instruction given at trial, reproduced here in its entirety, contained the phrase "eliminate all reasonable doubt":

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[3] Defendant does not claim that this Court can review his challenge to the reasonable doubt instruction because the error was structural. *See* Br. Aplt. at 13-14. Whether failure to object to a reasonable doubt instruction forecloses a claim of structural error is a question the supreme court left unresolved in *State v. Cruz*, 2005 UT 45, ¶ 18, 530 Utah Adv. Rep. 30.

> A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.
>
> *The state must eliminate all reasonable doubt.* Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.

R. 113 (emphasis added) (addendum A). For purposes of this appeal, the State does not dispute defendant's assertion that "eliminate all reasonable doubt," the phrase employed here, and "obviate all reasonable doubt," the phrase required by *Robertson* and rejected by *Reyes*, are functionally equivalent.

The *Reyes* court found the "'obviate all reasonable doubt' concept" "[i]nsightful and important," yet "linguistically opaque and conceptually suspect." *Reyes*, 2005 UT 33, ¶ 26.

> The process suggested by the "obviate all reasonable doubt" standard is also flawed because, contrary to its purpose, it tends to diminish the degree of proof necessary to convict and in that respect violates the *Victor* [*v. Nebraska*, 511 U.S. 1 (1994),] standard. The "obviation" of doubt contemplates a two-step undertaking: the identification of the doubt and a testing of the validity of the doubt against the evidence. This process suggests a back and forth disputation of a doubt's merits, all to the end of determining whether the evidence is sufficient to "obviate" the doubt. The "beyond a reasonable doubt" standard does not, however, condition a conclusion that a doubt is reasonable on an ability either to articulate the doubt or to state a reason for it.

Id. at ¶ 27. The court concluded, "[t]o the extent that the *Robertson* 'obviate' test would permit the State to argue that it need only obviate doubts that are sufficiently defined, the test works to improperly diminish the State's burden." *Id.* at ¶ 28.

Reyes thus holds that the "obviate test" diminishes the State's constitutional burden of proof *only* to the extent it would "permit the State to argue that it need only obviate doubts that are sufficiently defined." *Id.* Consequently, where the State does not argue that it need only obviate doubts that are sufficiently defined, the "obviate test" does not diminish the State's constitutional burden.

Defendant here does not claim, nor does the record disclose, that the prosecutor argued that the State need obviate only those doubts that are "sufficiently defined." *See* Br. Aplt. at 10-14. Referring to the elements instruction, the prosecutor stated, "the State has proven everything on this page beyond a reasonable doubt." R. 141: 165. In rebuttal she stated that defense counsel's "job is to raise a reasonable doubt, and he's done the best job he can, but he can't get over the hurdle of the State's evidence in this case." R. 141: 177. She thus argued that the State's evidence foreclosed all reasonable doubt. She did not argue that she need not refute any doubts because they were not "sufficiently defined." *Reyes*, 2005 UT 33, ¶ 28.

Defendant's claim fails for another reason. "[S]o long as the reasonable doubt instructions, 'taken as a whole, . . . correctly convey[ ] the concept of reasonable doubt to the jury,' they pass constitutional muster." *State v. Cruz*, 2005 UT 45, ¶ 20, 530 Utah Adv. Rep. 30 (quoting *Victor v. Nebraska*, 511 U.S. 1, 22 (1994)). "Simply put, [the court] need only

ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* at ¶ 21 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). In *Cruz*, the supreme court approved a reasonable doubt instruction containing the sentence, "The law does not require that the evidence dispel all possible or conceivable doubt, but rather that it dispel all reasonable doubt." *Id.* at ¶ 11. In the context of reasonable doubt instructions, "dispel," "obviate," and "eliminate" are synonyms. So in effect, the *Cruz* jury, like the jury here, was told that the State must "eliminate all reasonable doubt." Yet the Supreme Court approved the instruction.

The jury instructions here "pass constitutional muster" because, "taken as a whole," they "correctly convey[ed] the concept of reasonable doubt to the jury." *Cruz*, 2005 UT 45, ¶ 20 (internal quotation marks and citation omitted). This concept was conveyed not only by the reasonable doubt instruction quoted above, but also by others. *See* R. 107 ("In order to obtain a conviction, the State must prove every element of the offense beyond a reasonable doubt") ("If you believe that the state has proven each of these elements beyond a reasonable doubt, you should find defendant guilty. If the state has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty."); R. 108 ("If there was enough methamphetamine to test, there was enough methamphetamine to possess, provided the state proved all the required elements beyond a reasonable doubt").

In sum, even if defendant's claim were not waived, it fails on the merits.

II

DEFENDANT'S CHALLENGE TO HIS PRIOR CONVICTION FAILS BECAUSE HE INVITED THE ALLEGED ERROR HE CLAIMS ON APPEAL

Defendant claims that the judgment in his first conviction for possession was not final, and therefore the prior conviction may not be used to enhance his present conviction. Aplt. Br. at 15. In effect, defendant argues that because the judgment from his first conviction for possession incorrectly stated that he pled guilty to possession with intent to distribute, the judgment is of no effect. *Id.*

Following jury selection, defense counsel told the trial court that defendant, if found guilty, would stipulate to the prior possession conviction that enhanced the current charge from a third to a second degree felony. R.141:50-51. Defense counsel also explained that the prior judgment contained an error. R .141:48-49. Specifically, the judgment stated that defendant pled guilty to possession with intent to distribute, whereas defendant in fact pled guilty only to simple possession. R.141:48. Defense counsel represented that the error was simply clerical. *Id.* He further explained that he had discussed the discrepancy with defendant and that defendant was still willing to stipulate to the prior conviction. R.141:49. Defense counsel then asked defendant, "Maybe we need to get that prior judgment amended; but do you acknowledge that you do have a prior possession of a controlled substance [conviction]?" *Id.* Defendant responded, "Yeah." *Id.* Defense counsel explained that he "want[ed] to make a record of that. I just don't want that to be an appealable issue

somewhere down the road that [defendant is] saying that there was some type of—or making some type of collateral attack on that original judgment." *Id.*

After the jury found defendant guilty, he stipulated to his previous possession conviction. R.141:183. Defendant then requested to be sentenced immediately. R.141:185. The trial court asked if there was "[a]ny legal reason why sentence should not be pronounced?" R.141:187. Defense counsel responded, "None, your Honor." *Id.* Thereafter, the trial court ruled that defendant had been previously convicted of possession, which enhanced the current conviction from a third degree to a second degree felony:

> It's apparently conceded that the charge in case 9717-41 that the defendant actually pled guilty to was possession of a controlled substance; and there was just a clerical error in the judgment itself. He's—so he has clearly the predicate previous offense to make this a second degree felony.

R.141:187-88. The trial court then sentenced defendant. R.141:188. Defense counsel then asked the trial court if it would "consider an order—a motion at this time to amend the judgment in the other case?" *Id.* The trial court responded, "I would hope that [the prosecutor] would take care of that now." *Id.* She stated that she would. *Id.*[4]

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[4]According to the docketing statement for case number 9717-41, the judgment was amended 12 October and 14 October 2004. *See* Docket Case Number 9717-41 at 4, Addendum B.

A. Defendant invited any alleged error by stipulating to his prior conviction.

This Court has "held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993); *accord State v. Tillman*, 750 P.2d 546, 553 n.20, 560-561 (Utah 1987) (notwithstanding plain error exception to preservation rule, invited error viewed with disfavor and will operate to waive claim on appeal). A party invites error by representing to the court that he or she has no objection to a proposed course of action. *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 ("if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, we will not review the instruction under the manifest injustice exception").

Moreover, "where invited error butts up against manifest injustice, the invited error rule prevails." *State v. Perdue*, 813 P.2d 1201, 1206 (Utah App.1991).

Defendant invited the alleged error he now complains of. Despite a clerical error in the prior judgment, defendant twice stipulated that he had a prior convicted for possession. Before the start of trial, defense counsel explained to the trial court that there was a clerical error in defendant's prior judgment for possession of a controlled substance. R.141: 48-49. He further stated that he had discussed the error with defendant and that defendant was still willing to stipulate to the prior conviction. *Id.* Instead of claiming that the error rendered the judgment invalid, defendant stipulated to the prior conviction.

After the verdict, defendant again stipulated to his prior possession conviction. R.141:183. Thereafter, defendant invited the trial court to impose sentence without correcting the prior judgment. Further, when the trial court asked if there was any legal reason why sentence should not be imposed, defense counsel responded, "None, your Honor." R. 141:187. The reason for counsel's stance is obvious: whether the prior conviction was for simple possession or possession with intent to distribute, it enhanced the current offense. *See* Utah Code Ann. § 58-37-8(2)(c) (West 2004).

In sum, defendant invited the alleged error he now complains of.

B. The trial court did not commit error when it sentenced defendant before the prior judgment was amended.

Even if this Court reaches defendant's claim, the trial court did not commit error.

As stated, defendant is essentially claiming that a final judgment with a clerical error has no effect. Aplt. Br. at 15. According to Rule 30(b), Utah Rules of Criminal Procedure, "[c]lerical mistakes in judgments . . . may be corrected by the court *at any time* and after such notice, if any, as the court may order." (emphasis added). "A clerical error, as contradistinguished from judicial error, is not 'the deliberate result of the exercise of judicial reasoning and determination.'" *State v. Lorrah*, 761 P.2d 1388, 1389 (Utah 1988) (quoting *State v. Mossman*, 706 P.2d 203, 204 (Or. App. 1985) (additional quotation omitted). To determine whether the mistake is a clerical one, this Court looks to the record "to harmonize the intent of the [trial] court with the written judgment." *Lorrah*, 761 P.2d at 1389; *State v. Shelby*, 728 P.2d 987, 987-88 (Utah 1986).

Once a court determines that a judgment contains a clerical error, it has the authority to amend the judgment. *See* Utah R. Crim. P. 30(b). The supreme court has described the amending of a clerical error as *nunc pro tunc*. *See Preece v. Preece*, 682 P.2d 298, 299 (Utah 1984) ("Insofar as the correction of clerical errors is concerned, we have long recognized the power of the courts . . . to do an act upon one date and make it effective as of a prior date so that the record accurately reflects that which took place."); *see generally State v. Johnson*, 635 P.2d 36, 38 n.1 (recognizing that action taken *nunc pro tunc* has a "retroactive" effect). Thus, simply because a written judgment contains a clerical error, it does not render that judgment of no effect. *See Bagnall v. Suburbia Land Co.*, 579 P.2d 917, 918 (holding trial court may correct clerical error after appellate court has affirmed trial court's decree).

Here, defense counsel explained that the mistake in the prior judgment was simply a clerical error. R.141:48. Following the trial, the trial court also agreed that the error in the prior judgment was clerical. R.141:187-88. Thereafter, the trial court stated that it hoped that the prosecutor would amend the prior judgment. R.141:188. The prosecutor stated that she would. *Id.* Thus, all parties agreed that the error in the prior judgment was clerical. *See State v. Diviney*, 2004 UT App 178, ¶ 2, 2004 WL 1368190 (unpublished memorandum decision) (judgment contained clerical error by stating that Diviney pled guilty to aggravated burglary instead of simple burglary); *Lawler v. State*, 2002 UT App 437, ¶ 3, 2002 WL 31875661 (unpublished memorandum decision) (judgment contained clerical error by stating that Lawler was convicted of rape instead of forcible sexual abuse).[5]

[5]In compliance with Utah R. App. P. 30(f), accurate copies of both *Diviney* and *Lawler* are attached at Addendum C.

Therefore, contrary to defendant's assertion, clerical errors do not render a prior judgment of no effect.

In addition, the trial court treated defendant's prior conviction as a conviction for possession and not possession with intent to distribute. Thus, even if this Court held that the trial court committed error, defendant suffered no prejudice.

CONCLUSION

Defendant's conviction should be affirmed.

ORAL ARGUMENT REQUESTED

The State requests oral argument. "[O]ral argument is a tool for assisting the appellate court in its decision making process," *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and "the only opportunity for a dialogue between the litigant and the bench." *Moles v. Regents of Univ. of Calif.*, 187 Cal. Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would "be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

RESPECTFULLY submitted on 19 September 2005.

MARK L. SHURTLEFF
Attorney General

J. FREDERIC VOROS, JR.
Assistant Attorney General
Chief, Appeals Division

CERTIFICATE OF SERVICE

I hereby certify that this 19 September 2005, 2 copies of the foregoing brief of appellee were ☐ hand-delivered to an agent of ☒ mailed to the following:

ANDREW FITZGERALD
55 East 100 South
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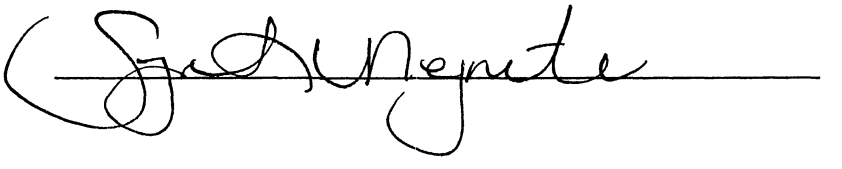

Addenda

Addendum A

JURY INSTRUCTION NO. 9

A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.

The state must eliminate all reasonable doubt. Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.

Addendum B

7TH DISTRICT COURT- MONTICELLO
SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH vs. ERIC HALLS

CASE NUMBER 971700041 State Felony

CHARGES

Charge 1 - 58-37-8(1AII) - DISTRIBUTE/OFFER/ARRANGE TO DIST C/S (amended)
3rd Degree Felony Plea: May 16, 1997 Guilty
Disposition: May 16, 1997 {Guilty Plea}
Charge 2 - 58-37-8(1AII) - DISTRIBUTE/OFFER/ARRANGE TO DIST C/S
2nd Degree Felony
Disposition: May 16, 1997 Dismissed
Charge 3 - 58-37-8(1AII) - DISTRIBUTE/OFFER/ARRANGE TO DIST C/S
3rd Degree Felony
Disposition: May 16, 1997 Dismissed

CURRENT ASSIGNED JUDGE
LYLE R. ANDERSON

PARTIES

Defendant - ERIC HALLS
DRAPER, UT
Represented by: WILLIAM L SCHULTZ

Plaintiff - STATE OF UTAH
Represented by: WILLIAM L BENGE

DEFENDANT INFORMATION

Defendant Name: ERIC HALLS
Offense tracking number: 9002643
Date of Birth: November 22, 1977
Law Enforcement Agency: COUNTY ATTORNEY
Prosecuting Agency: SAN JUAN COUNTY
Violation Date: April 15, 1996

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	2.00
	Amount Paid:	2.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

	Amount Due:	2.00

CASE NUMBER 971700041 State Felony

Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

CASE NOTE
UTAH STATE PRISONER

PROCEEDINGS

02-19-97 Information filed
02-19-97 Initial Appearance scheduled on March 20, 1997 at 09:31 AM in COURTROOM 1 with Judge ANDERSON.
02-20-97 Note: Update: Gave Mark Ewart Order to Produce Prisoner to forward to prison
03-20-97 Minute Entry - Initial Appearance
Judge: LYLE R. ANDERSON
PRESENT
Clerk: SHELLY BROWN
Prosecutor: WILLIAM L. BENGE
Defendant
Defendant's Attorney(s): WILLIAM L. SCHULTZ

Audio
Tape Number: 7-50 Tape Count: 780

INITIAL APPEARANCE

A copy of the Information is given to the defendant.
Defendant advised of charges and penalties.
Case recalled 50/1523. Defendant demanded a preliminary hearing.
03-20-97 Preliminary Hearing scheduled on May 16, 1997 at 01:30 PM in COURTROOM 1 with Judge ANDERSON.
03-21-97 Filed: APPLICATION AND ORDER FOR COURT APPOINTED COUNSEL-APPOINTED
03-24-97 Filed: ORDER TO PRODUCE PRISONER W/CERTIFICATE OF MAILING
03-27-97 Filed: CERTIFICATE OF THE SERVICE OF THE REQUEST FOR DISCOVERY
04-02-97 Filed return: RETURN OF SERVICE WITH SUBPOENA
Party Served: LYLE BAYLAS
Service Type: Personal
Service Date: March 31, 1997
04-02-97 Filed return: RETURN OF SERVICE WITH SUBPOENA
Party Served: C I 108
Service Type: Substitute
Service Date: March 31, 1997
04-02-97 Filed return: RETURN OF SERVICE WITH SUBPOENA
Party Served: C I 109
Service Type: Substitute
Service Date: March 31, 1997
05-13-97 Preliminary Hearing scheduled on May 16, 1997 at 01:29 PM in

COURTROOM 1 with Judge ANDERSON.
05-15-97 Change of Plea scheduled on May 16, 1997 at 01:29 PM in
COURTROOM 1 with Judge ANDERSON.
05-15-97 Preliminary Hearing Cancelled scheduled for: 5/16/97
05-16-97 Charge 1 amended
05-16-97 Charge 1 Disposition is Guilty Plea
05-16-97 Charge 2 Disposition is Dismissed
05-16-97 Charge 3 Disposition is Dismissed
05-16-97 Minute Entry - Arraignment
Judge: LYLE R. ANDERSON
PRESENT
Clerk: shellyb
Prosecutor: WILLIAM L. BENGE
Defendant
Defendant's Attorney(s): WILLIAM L. SCHULTZ

Audio
Tape Number: 97-97 Tape Count: 5958

ARRAIGNMENT

Defendant advised of rights and penalties.
Defendant waives preliminary hearing.
Defendant waives time for sentence.
Defendant has 30 days to withdraw his plea of guilty. The state consents to the waiving of the preliminary hearing.
SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SAN JUAN County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Defendant is to serve this sentence concurrent with any other prison sentences.
Defendant is remanded to the custody of the prison. All parties signed the defendant's statement.
05-16-97 Filed: STATEMENT OF DEFENDANT
05-28-97 Filed order: ORDER Preliminary Hearing Waived
Judge landerso
Signed May 27, 1997

05-28-97 Filed judgment: FINDINGS, JUDGMENT AND COMMITMENT W/CERTIFICATE OF MAILING
Judge landerso
Signed May 16, 1997
03-11-98 Fee Account created Total Due: 2.00
03-11-98 COPY FEE Payment Received: 2.00
Note: Mail Payment
10-12-04 Filed order: AMENDED JUDGMENT AND C OMMITMENT TO UJTAH STATE PRISON
Judge janderso
Signed October 12, 2004
10-14-04 Filed order: SECOND AMENDEDJUDGMENT AND COMMITMENT TO UTAH STATE PRISON
Judge janderso
Signed October 14, 2004

Addendum C

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Charles Lee DIVINEY, Defendant and Appellant.
No. 20020220-CA.

June 4, 2004.

Third District, Salt Lake Department; The Honorable Sheila K. McCleve.

Linda M. Jones, Salt Lake City, for Appellant.

Mark L. Shurtleff and Kris C. Leonard, Salt Lake City, for Appellee.

Before Judges BENCH, JACKSON, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

ORME, Judge:

***1** We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R.App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Utah Rule of Criminal Procedure 22(e) provides that "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." In addition, "clerical errors

> ... may be corrected at any time." *State v. Lorrah,* 761 P.2d 1388, 1390 (Utah 1988). Defendant alleges, and the State agrees, that the trial court committed a clerical error when it entered a judgment, sentence, and commitment that reflected Defendant pled guilty to aggravated burglary, when Defendant was actually charged with and pled guilty to simple burglary. We agree that a clerical error was made by the trial court, and, therefore, in order "to harmonize the intent of the [trial] court with the written judgment," *id.* at 1389, we remand to the trial court for entry of a corrected judgment to reflect Defendant's guilty plea to burglary rather than aggravated burglary.

Defendant raises several issues regarding the restitution award, the first of which pertains to the calculation of lost wages. According to Defendant's recalculation, with which the State agrees, the victim should only have been awarded $1,978.25 in lost wages. Therefore, we remand so the trial court can adjust the restitution amount accordingly.

Next, Defendant argues that the victim was improperly compensated for lost wages on "charge-off" days. The victim testified that she could have worked at both jobs on charge-off days, and, therefore, that she is entitled to compensation for lost wages from the school district because, due to the injuries she suffered, she was unable to work at the school district on such days. Defendant points out that, prior to the injuries, the victim never worked both jobs on charge-off days and even after her recovery, she never worked both jobs on such days.

Section 76-3-201 defines restitution as "full, partial or nominal payment for pecuniary damages to a victim" of criminal activity, Utah Code Ann. § 76-3- 201(1)(d) (2003), and pecuniary damages as "all special damages, but not general damages." *Id.* § 76-3-201(1)(c). *But see State v. Corbitt,* 2003 UT App 417,¶¶ 19-28, 82 P.3d 211 (Orme, J., concurring). Special damages consist of "actual loss of past earnings and anticipated loss of future earnings." Utah Code Ann. § 63-25a-411(4)(d) (Supp.2003). In seeking compensable damages, the victim must show that a loss has actually occurred.

See Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 364 (Utah 1997). The State failed to prove that the victim ever actually worked on charge-off days at the school district either before the incidents involving Defendant or after her recovery. Based on her actual work history, the victim is not entitled to recover lost wages from the school district on charge-off days. The trial court is instructed to make the appropriate adjustment on remand.

***2** Defendant's other restitution claims were not preserved for appeal and need not be reached. Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure requires that Defendant cite "to the record showing that the issue was preserved in the trial court." Although Defendant did cite to the record where he objected to the restitution in general and to certain specific items included in the restitution award, Defendant failed to specifically object to the July 18, 2001 lost wages, the alarm system installation at her son's house, and the quarterly payments due on both alarm systems following the first incident. "Generally, a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal." *State v. Archambeau,* 820 P.2d 920, 922 (Utah Ct.App.1991). *See also Harris v. IES Assocs.,* 2003 UT App 112,¶ 51, 69 P.3d 297 (holding that "general reference[s] to the trial transcript volumes" are insufficient to satisfy the requirement of rule 24(a)(5)(A)).

We remand to the trial court to correct the clerical error to reflect Defendant's guilty plea to burglary and to adjust the amount of restitution as specified herein. Otherwise, we affirm.

WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and NORMAN H. JACKSON, Judge.

END OF DOCUMENT

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Sylvester LAWLER, Petitioner and Appellant,
v.
STATE of Utah, Respondent and Appellee.
No. 20011006-CA.

Dec. 27, 2002.

Third District, Salt Lake Department; The Honorable Dennis M. Fuchs.

Sylvester Lawler, Draper, Appellant Pro Se.

Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee.

Before Judges BILLINGS, BENCH, and THORNE.

MEMORANDUM DECISION

PER CURIAM:

***1** Appellant Sylvester Lawler appeals the denial of his petition for post-conviction relief.

Lawler was charged with one count each of rape and forcible sodomy, both first degree felonies. Pursuant to a plea bargain, he pleaded guilty to a single count of forcible sexual abuse, a second degree felony. Approximately one month before the change of plea, Lawler's retained counsel moved to withdraw on the basis that Lawler was unable to pay him. The district court denied the motion, and Lawler's retained counsel continued to represent him through entry of the guilty plea, conviction, and sentencing. The district court conducted a detailed examination at the change of plea hearing during which Lawler expressed his satisfaction with counsel's representation and his belief that the plea was in his best interest and was not motivated by his counsel's financial concerns.

In the petition for post-conviction relief, Lawler claimed that (1) he received ineffective assistance and his counsel had a conflict of interest; (2) his guilty plea was not knowing and voluntary; and (3) the written judgment and sentence incorrectly stated that he was convicted of rape. Although the original judgment contained a clerical error made in reducing the sentence to a written judgment, the court amended the judgment to correctly reflect a conviction of forcible sexual abuse, rather than rape. The court sent the corrected judgment and sentence to Lawler and to the Board of Pardons. Accordingly, the district court correctly dismissed as moot the claim that Lawler was convicted of, or sentenced for, the wrong offense.

The district court concluded, based upon review of the record in the original criminal proceeding, that trial counsel did not render ineffective assistance and the guilty plea was knowing and voluntary. The detailed plea colloquy fully explored and disposed of any claim that Lawler was dissatisfied with his legal representation. This included Lawler's admission that he believed the guilty plea was in his best interest and was not motivated by counsel's financial concerns. In addition, the negotiated plea was clearly advantageous because Lawler had confessed to having sexual intercourse with, and sodomizing, the minor victim, which was also supported by physical evidence.

Lawler's post-conviction claim that he was offered, and believed that he had accepted, a negotiated plea bargain that would have allowed him to plea guilty to two third degree felonies was not supported by the trial court record. The plea colloquy and statement of defendant clearly set forth the offense to which Lawler pleaded guilty and negated the existence of any other promises. The district court correctly concluded that the record demonstrated

Lawler understood the plea that he ultimately entered.

Finally, the district court correctly rejected a post-conviction claim that the psychosexual evaluation of Lawler was inaccurate because it did not challenge the conviction or sentence.

***2** Accordingly, we affirm the district court's denial of post-conviction relief.

Not Reported in P.3d, 2002 WL 31875661 (Utah App.), 2002 UT App 437

END OF DOCUMENT